

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

CLERK'S OFFICE U.S. DIST. COURT
AT LYNCHBURG, VA
F.M.F.D.

DEC 21 2007 *for C'ville*
JOHN F. CORCORAN, CLERK
BY: *J. Corcoran*
DEPUTY CLERK

DAVID E. CALKINS,
Plaintiff,
v.
PACEL CORPORATION,
Defendant.
PACEL CORPORATION,
Counterclaim Plaintiff,
v.
DAVID E. CALKINS,
F. KAY CALKINS, AND
DUCESSE FARMS, LLC,
Counterclaim Defendants.

Case No. 3:07cv00025

ORDER

JUDGE NORMAN K. MOON

This matter is before the Court on Counterclaim Plaintiff Pacel Corporation's Rule 37 motion to compel and for sanctions, and on Counterclaim Defendant Duchesse Farms, LLC's Motion to Quash Lis Pendens and Motion for Summary Judgment. Pursuant to Federal Rule of Civil Procedure 37, and for reasons that will be set forth in a Memorandum Opinion to follow:

(1) David E. Calkins, F. Kay Calkins, and Duchesse Farms, LLC (collectively "Counterclaim Defendants") are hereby ORDERED to provide Pacel Corporation with any and all past-due discovery materials, including Rule 26(a) disclosures, answers to Rule 33 interrogatories, and responses to Rule 34 requests, on or before January 11, 2008. Counterclaim Defendants are instructed that an evasive or incomplete disclosure, answer, or response, including one submitted prior to this Order, will be treated as a failure to disclose, answer, or respond unless the deficiency is remedied on or before January 11, 2008.

(2) Pacel Corporation's request for its expenses, including attorney's fees, caused by Counterclaim Defendants' failure to comply with their discovery obligations is GRANTED to the extent that those expenses are reasonable. Accordingly, Pacel Corporation is hereby ORDERED to submit to the Court within thirty (30) days of the date of this Order an accounting of said expenses, including attorney's fees. Following Pacel Corporation's submission, the amount and apportioning of reasonable expenses to be paid by Counterclaim Defendants and/or their attorneys, as well as the deadline for payment, will be determined by the Court.

(3) Pacel Corporation's request that Counterclaim Defendants be prohibited from supporting or opposing designated claims or defenses at trial, or that they be precluded from presenting any evidence at trial not timely disclosed, is hereby DENIED with leave to renew should Counterclaim Defendants again fail to comply with their discovery obligations.

(4) Pacel Corporation's request for default judgment against F. Kay Calkins and Duchesse Farms, LLC is hereby DENIED with leave to renew should Counterclaim Defendants again fail to comply with their discovery obligations.¹

(5) Counterclaim Defendants are hereby WARNED that, absent exceptional circumstances, any future failure to comply with their discovery obligations, including those set forth in this Order, will result in the entry of a default judgment against the non-complying Counterclaim Defendant.

(6) Duchesse Farms, LLC's Motion to Quash Lis Pendens is hereby DENIED with leave to re-file after discovery has concluded.

¹ The Court would grant default judgment if not for the Fourth Circuit's unmistakable intent that a district court first give a clear warning of the possibility of a default judgment and an opportunity to comply with the court's orders. See *Anderson v. Found. for Advancement, Educ. and Employment of Am. Indians*, 155 F.3d 500, 504 (4th Cir. 1998); *Hathcock v. Navistar Int'l Transp. Corp.*, 53 F.3d 36, 40–41 (4th Cir. 1995); *Mutual Fed. Sav. & Loan Ass'n v. Richards & Assoc., Inc.*, 872 F.2d 88, 93–94 (4th Cir. 1989).

(7) Duchesse Farms, LLC's Motion for Summary Judgment is hereby DENIED with leave to re-file after discovery has concluded.

In summary, Pacel Corporation's Rule 37 motion to compel and for sanctions (docket entry no. 57) is hereby GRANTED IN PART AND DENIED IN PART, and Duchesse Farms, LLC's Motion to Quash Lis Pendens and Motion for Summary Judgment (docket entry nos. 39 and 40) are hereby DENIED.

It is so ORDERED.

The Clerk of the Court is hereby directed to send a certified copy of this Order to all counsel of record.

ENTERED:

Jean C. Khan
United States District Judge

December 21, 2007
Date